(3)

No. 98-1037

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

GEORGE SMITH, Warden, *Petitioner*,

v.

LEE ROBBINS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DE NICOLA
Supervising Deputy Attorney General
*CAROL FREDERICK JORSTAD
Deputy Attorney General
*Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2277
Fax: (213) 897-2263
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, CONT'D

TABLE OF AUTHORITIES, CONT'D

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998
No. 98-1037

GEORGE SMITH, Warden, *Petitioner*,
v.
LEE ROBBINS, *Respondent*.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

Petitioner ("the Warden") respectfully submits this reply to the opposition to the petition for writ of certiorari to correct errors, omissions and inaccuracies in the opposition.[1]

ARGUMENT

I.

Robbins is demonstrably wrong in arguing that *Robbins v. Smith* is fact-specific and does not affect California's no-merit brief procedure

Respondent Robbins goes to great lengths in his opposition to deride the Warden's concern for the future of the California no-merit brief procedure. He declares that the "alarming picture" painted by the Warden "is an

---

1. Preliminarily, counsel for the Warden acknowledges her own error in the certiorari petition. In referring to Robbins, who is respondent in this Court, counsel for the Warden erroneously labeled him "petitioner" in portions of the Argument section. Pet. 9, 12-14, 19, 22. The Warden is submitting a corrected copy of the Petition and respectfully requests that the Court file it. Counsel regrets her error and apologizes for any inconvenience or confusion her oversight has caused the Court.

utter fabrication." Opp. 19. He insists the decision is one of "limited scope," "straightforward and fact-specific." Opp. 14. According to the opposition, the Ninth Circuit did not find California's procedure inadequate. Opp. 14. Consequently, the decision "poses no threat to California courts or to the administration of justice in California." Opp. 20. The Ninth Circuit apparently disagrees.

In a decision not cited in the opposition, Judge Reinhardt, a member of the *Robbins* panel, took up the validity of California's no-merit procedure in a case filed after the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA). *Davis v. Kramer*, 1999 U.S. App. LEXIS 918, slip op. 3-4 (CA9 Jan. 26, 1999). *Robbins v. Smith*, 152 F.3d 1062 (CA9 1998), had been determined under the pre-AEDPA habeas corpus law. Except for the fact that *Davis* was post-AEDPA, Judge Reinhardt found *Robbins* and *Davis* to be "factually indistinguis[illegible]e in all relevant respects." *Id.* at 5. That these briefs are very similar is no coincidence. Both appellate attorneys were following the standard no-merit brief procedure, in accordance with California's long-settled, previously-unquestioned formula. *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (Cal. 1979).

Not surprisingly, the panel struck down the brief filed in *Davis*, just as the *Robbins* panel had earlier done. *Davis*, slip. op. 3. It was required to do so, because only the court sitting en banc can reconsider a rule of law embodied in a prior published opinion. *United States v. Gay*, 967 F.2d 322, 327 (CA9 1992); *Antonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (CA9 1987). Once the Ninth Circuit denied the Warden's suggestion for rehearing en banc, it was predictable that *Robbins* would metastasize.

The Ninth Circuit has struck down two similar California no-merit briefs as insufficient under *Anders v. California*, 386 U.S. 738 (1967), even though both briefs were filed in compliance with *People v. Wende*, the state-

law interpretation of *Anders*. *Davis* is irrefutable proof of the Ninth Circuit's apparent determination to obliterate Wende, even if it has to do it a brief at a time.

Where does that leave the California courts? In chaos. State courts are not bound in a *stare decisis* sense by the decisions of the federal courts of appeals. *People v. Bradley*, 1 Cal. 3d 80, 86, 81 Cal. Rptr. 457 (Cal. 1969); *see also Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (conc. op. of Thomas, J.). They are bound only by the decisions of this Court and of the state supreme court. *Id.* In fact, as this Court only recently reminded the Ninth Circuit,

> state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.

Arizonans for Official English v. Arizona et al., 520 U.S. 43, 117 S. Ct. 1055, 1064 n.11 (1997).

In California, that means the intermediate appellate courts are obliged to follow *Wende*, unless and until either this Court or the state supreme court strikes it down. At the same time, all federal courts in the Ninth Circuit are bound to follow *Robbins* and now *Davis*.[2] *Gay*, 967 F.2d at 327.

As a practical matter, California's appointed appellate counsel are faced with an insoluble dilemma. In no-merit cases -- more than 20 percent of all criminal cases on appeal -- state law directs them to adhere to a procedure on direct appeal for which they will predictably be found, one by one, to have provided ineffective assistance when their work is reviewed on federal habeas corpus.

---

2. Warden Kramer intends to file a petition for writ of certiorari in the *Davis* case.

The confusion is effectively limned in the amicus brief filed by the California Academy of Appellate Lawyers. Members of the Academy accept appointments from the state appellate courts to represent indigent appellants, serve on the state's Appellate Indigent Defense Oversight Advisory Committee, and administer the state's appellate projects. Amicus 1. Amicus has joined the Warden in his effort to retain the *Wende* procedure, not because defense counsel have suddenly become insensitive to the rights of their clients, but because they are persuaded that they can represent their indigent clients most ethically and effectively under the *Wende* system. Amicus 8, 11-12.

In his opposition, respondent insists that there is nothing new in *Robbins*, because "[a]ll it held was that the skimpy brief filed in Robbins' behalf on direct appeal did not comply with either *Anders* or with the California cases[.]" Opp. 14. The Ninth Circuit's decision in *Davis* belies that claim. Robbins's assertion is also rebutted by the amicus brief, in which the Academy flatly declares that

> the decision of the Ninth Circuit Court of Appeals in this case would invalidate the existing procedure for "no-merit" appeals in California cases involving indigent defendants. . . .

Amicus 2.

The Ninth Circuit did not even wait to decide *Davis* until this Court had resolved the certiorari petition in *Robbins*. For all of these reasons, as petitioner has previously urged, a grant of certiorari is urgently needed.

II.
Robbins's attempts to obscure the issue in this case should not be permitted to succeed

In an apparent attempt to obfuscate what is, after all, a very simple legal point, Robbins lays out page after page of factual material, most of which is wholly irrelevant to the issue before this Court. Opp. 1-8. The Court need not make its way through this smokescreen to rule on the propriety of California's no-merit brief procedure. The Warden will focus his reply on the waiver of counsel at trial and the effectiveness of counsel on appeal.[3]

A. The waiver of counsel at trial

Robbins insisted on representing himself at trial, as he had a right to do. *Faretta v. California*, 422 U.S. 806 (1975). He now provides this Court with an account of his miscues and defaults at trial, pleading for relief from his own incompetence. Opp. 2-8.

At trial, Robbins, an indigent, tried to force the court to remove the public defender and appoint counsel of his choice. Alternatively, Robbins wanted advisory counsel. During the protracted pretrial period, Robbins received *eight* hearings before *four* different judges relating to his requests for other representation, advisory representation and, ultimately, self-representation. ER 4 at 74-87; ER 5 at 88-110; ER 1 at 1-19; ER 3 at 46-50; ER 2 at 37-45; ER 3 at 51-59; ER 3 at 60-73. Each judge exercised his discretion to refuse the first two options. *Id.* When Robbins was unsuccessful in manipulating the court, he demanded to represent himself. He was undeterred by the exhaustive admonitions of the court and the deputy district attorney. ER 1 at 6-15. At that point, Robbins had been certified competent for trial, and the court, finding he had knowingly and intelligently waived counsel,

---

3. Robbins disingenuously suggests that the Warden does not contest the Ninth Circuit's ruling that there were at least two non-frivolous issues to be raised. Opp. at 15 n.6. As Robbins is aware, the Warden has vigorously challenged that assertion at every stage of this litigation. The Warden did not mention it in the petition for certiorari, because it was not relevant to the questions presented.

had no real choice but to accede to his demand. ER 1 at 9-12. Eight days before the trial, after Robbins had delayed for months, he told the trial court:

> . . . I would like to have the assistance of counsel at the trial. I am not real good at public speaking. I am doing okay as far as the law work and stuff. Obviously, I am not a lawyer, but I need somebody to help me present the case.

ER 3, pp. 60, 69. Interpreting Robbins's statement as a request for counsel, the trial court offered to reappoint the public defender. Robbins declined the offer and went to trial as his own attorney. Small wonder, the chickens came home to roost.

As Robbins now acknowledges, he failed to voir dire jurors, introduce exculpatory evidence, impeach prosecution witnesses, overcome the prosecutor's objections, and argue the presumption of innocence or the burden of proof -- and that was only the beginning. Opp. 3-7. Most significantly, Robbins failed to preserve any issues for direct appeal.

In *Faretta* itself, Justice Blackmun, writing in dissent, warned:

> If there is any truth to the old proverb that "one who is his own lawyer has a fool for a client," the Court by its opinion today now bestows a constitutional right on one to make a fool of himself.

Id. at 852. Having represented himself at trial, Robbins cannot complain of ineffective assistance on appeal. *Faretta*, 422 U.S. at 846 n.46.

Robbins's assertion that the case was close is absurd. As he himself acknowledges, the jury found him guilty of second degree murder after "several hours." Opp. 7. This was not a close case.

B. <u>Appellate counsel's effectiveness</u>

Respondent recites at length the alleged defaults of his appellate attorney. He avers that the record was "replete with non-frivolous issues." Opp. 9. He charges counsel not only with failing to file a merits brief, but also with filing a deficient no-merit brief. *Id.* His claims are spurious.

1. <u>The decision to file a no-merit brief</u>

California courts have rejected the notion of an "'arguable-but-unmeritorious'" issue on appeal. *People v. Johnson*, 123 Cal. App. 3d 106, 109, 176 Cal. Rptr. 390 (1981). An arguable issue is one which is meritorious, that is, one which has a reasonable potential for success. *Id.* In addition, the issue must, if resolved favorably to the defendant, result in a reversal or a modification. *Id.*; *accord*, *People v. Placencia*, 9 Cal. App. 4th 422, 425, 11 Cal. Rptr. 2d 727 (1992). The Ninth Circuit has not grasped this point. Indeed, this is the heart of California's dispute with the Ninth Circuit. For the Ninth Circuit, it appears, there simply cannot be a meritless appeal. The Ninth Circuit is wrong. This is one.

Robbins's counsel on appeal cannot be faulted for filing a no-merit brief when Robbins did not preserve any appellate issues at trial. Under California law, matters outside the trial record will not be considered on direct appeal. Cal. R. Ct. 4, 5; *In re Kathy P.*, 25 Cal. 3d 91, 102, 157 Cal. Rptr. 874 (1979). Through his own inexperience, Robbins simply did not provide appellate counsel with a record which would have permitted a merits appeal. The lower federal courts suggested two issues were potentially meritorious: the adequacy of the law library and the counsel issue. Those claims are fully refuted by the record. The sole mention of the law library was in the trial court's *Faretta* warnings to Robbins. ER 2 at 37-41. There was no *evidence* from Robbins or any

other source in the record to support such a claim on appeal. ER 3 at 60, 69.

As to the issues relating to counsel, space does not permit a full exposition of what transpired in the eight hearings that Robbins was given. However, the record unequivocally shows that Robbins's federal constitutional rights were scrupulously honored. His real complaint is that he asked to represent himself, was allowed to do so, and is now suffering the consequences. That claim is not cognizable on appeal in any court.

Appellate counsel for Robbins was thorough, competent and experienced, but not a magician. He knew that there were no non-frivolous issues to be raised, because there was no record or no legal support or both.

2. <u>The adequacy of the no-merit brief</u>

As more fully detailed in the amicus brief, the brief of counsel on appeal was fully compliant with *People v. Wende*, the state-court interpretation of *Anders v. California*. Contrary to respondent's assertion, counsel cited to the record throughout his brief. Pet. App. G.

In invalidating the brief this case, the Ninth Circuit necessarily discredited the entire state procedure. The opinion in *Davis v. Kramer* resolves any lingering doubt on that score. Counsel was competent. He knew and understood state procedures and state law. The only significant issue presented by this case is whether *Wende* is a valid interpretation of *Anders*.

Robbins accuses appellate counsel of being unethical for providing a declaration to the state on federal habeas corpus. Opp. 13 n.4. Robbins waived the privilege when he alleged incompetence. Counsel was entitled under both state and federal law to defend himself. *Wharton v. Calderon*, 127 F.3d 1201, 1203 (CA9 1997); *In re Gray*, 123 Cal. App. 3d 614, 616, 176 Cal. Rptr. 721 (Cal. 1981).

III.
California's *Wende* procedure is protected from a habeas court's retroactive invalidation by *Teague v. Lane*

Finally, respondent suggests that the Warden's "misconstruction of the scope of the appellate decision drives its argument under *Teague v. Lane[.]*" Opp. 22. However, as the Warden has previously argued, unless the federal courts have exclusive jurisdiction, the state courts have the authority to interpret federal law and render binding decisions on it. *Arizonans for Official English v. Arizona et al.*, 117 S. Ct. at 1064 n.11. It has never been suggested that the federal courts have exclusive authority to interpret the law relating to the filing of no-merit appellate briefs. On the contrary, the nationwide legal history dispositively demonstrates that states have authority to interpret this Court's case law in ways that are practicable. As Justice Brandeis said:

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment . . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. diss.). This case is all about the Ninth Circuit retroactively fettering the state courts' handling of no-merit indigents' briefs. As is apparent from the amicus brief, the California bench and bar have relied on *Wende* as a valid explication of *Anders* for the last 20 years. *Teague v. Lane* proscribes the undermining of California's

reasonable, good-faith interpretation at this late date on federal habeas corpus.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: February 1, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DE NICOLA
Supervising Deputy Attorney General

Carol F. Jorstad

*CAROL FREDERICK JORSTAD
Deputy Attorney General
*Counsel of Record

Counsel for Petitioner

CFJ:gr

No. 98-1037

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

GEORGE SMITH, Warden, Petitioner,
v.
LEE ROBBINS, Respondent.

PROOF OF SERVICE UNDER RULE 29.5(c)

I, GIL CARREON, declare as follows:

I am over 18 years of age, and not a party to the within cause, my business address is 300 S. Spring Street, Los Angeles, California 90013;

I served **three (3) copies** of the REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in the above entitled case on each of the following persons:

Ronald J. Nessim, Esq.
Elizabeth A. Newman, Esq.
BIRD, MARELLA, BOXER, WOLPERT & MATZ
A Professional Corporation
1875 Century Park East, 23rd Floor
Los Angeles, CA 90067-2561

by placing same in an envelope(s) addressed to the post office address of each said person(s), and by sealing and then depositing each said envelope, on FEB 0 2 1999, in the United States mail at Los Angeles, California, with first-class postage thereon fully prepaid;

I thereby certify that I am employed in the office of member of the Bar of this Court at whose direction the servie was made;

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on FEB 0 2 1999, at Los Angeles, California.